

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7647
WWW.SWIDLAW.COM

L. ELISE DIETERICH
DIRECT DIAL: (202) 945-6983
FAX: (202) 424-7643
LEDIETERICH@SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL. (212) 973-0111
FAX (212) 891-9598

December 9, 2002

ELECTRONICALLY FILED

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20024

**Re: Written *Ex Parte* Presentation for Filing in MB Docket 02-70, in re
the Applications of AT&T Broadband and Comcast Corporation.**

Dear Secretary Dortch:

We write on behalf of RCN Telecom Services, Inc. ("RCN"), to strenuously oppose the apparent effort by Comcast Corporation ("Comcast"), disclosed in Comcast's *Ex Parte* Notice filed November 26, 2002, in the above-captioned proceeding and reported in the trade press, to obtain the modification or deletion of paragraphs 117-122 of the Order in this matter released on November 14, 2002. The language in question accurately reflects the record in this proceeding and, in particular, the evidence submitted by RCN documenting Comcast's predacious sales, marketing, and promotional practices. *See generally* RCN Telecom Services, Inc., Further Written *Ex Parte* Presentation, dated November 1, 2002, on file herein, listing RCN's submissions in this proceeding and summarizing RCN's views and comments on the issue of predatory pricing by Comcast.

As set forth fully in RCN's November 1 filing, RCN and other competitive broadband multi-channel video programming distributors ("MVPDs") have provided ample evidence to support the Commission's conclusion that Comcast and its merger partner "engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers." *See, e.g.*, Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent, dated April 29, 2002 ("Petition"), at 22 and Exh. A; Comments of Everest Midwest Licensee, LLC, DBA Everest Connections, dated April 29, 2002, at 3

(addressing predatory pricing by AT&T affiliate Kansas City Cable Partners); Comments of the Broadband Service Providers Association, dated May 21, 2002, at 10-11; *Ex Parte* Notice filed by the Broadband Service Providers Association, September 19, 2002, and attached Statement of Mark Haverkate, dated April 23, 2002, at 10-11. Indeed, as the Commission noted in its November 14, 2002, Order, the anticompetitive practices documented in the record in this proceeding are of sufficient concern that “the DOJ may have begun an investigation into this behavior.” Although the Commission concluded that “the record does not provide us with sufficient evidence to conclude that the merger itself would *increase* AT&T Comcast’s incentive or ability to resort to such tactics,” and, accordingly, that merger conditions addressing the behavior were not warranted, the discussion of the issue in paragraphs 117-122 of the Order is an absolutely necessary and appropriate explication of the record in this proceeding, and should not be disturbed simply because Comcast takes issue with the Commission’s conclusions.

The Order makes clear that the Commission neither disregarded nor misunderstood the Applicants’ many filings on this issue. Rather, the Order reflects the careful consideration given to the Applicants’ position, and further reflects that the Commission ultimately disagreed with the Applicants in several important respects:

Applicants maintain that their pricing practices are not unfair, but competitive and consistent with the Communications Act and the Commission’s rules. . . Applicants also contend that their discounts are not “predatory” and that they do not contain customer-based or geographic restrictions because any customer in the franchise area *who learns of a discount* may receive it upon request. Finally, Applicants argue that price competition between the incumbent cable operator and the new entrant benefits consumers.

Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition. . . We also disagree with Applicants’ claim that targeted discounts merely reflect healthy competition . . .

* * *

We do not agree with the Applicants that targeted pricing enhances competition.

Memorandum Opinion and Order, rel. November 14, 2002, at ¶¶ 119-121 (emphasis in original). Accordingly, there is no reason for the Commission to retreat from its conclusions, nor does Comcast in its *ex parte* notice state any reason, other than “that Comcast does not regard those paragraphs as accurately summarizing the state of the record or properly analyzing the relevant issues,” a point of view that Comcast, according

to its *ex parte* notice, already had addressed in the “prior record filings that set forth Comcast’s views on these matters,” which were before the Commission at the time the Order was entered.

RCN, by its attorneys, is submitting the written *ex parte* presentation contained in this letter by e-mail to the decision makers named in the “cc” list, below. Pursuant to section 1.1206(b)(1) and 1.49(f) of the Commission’s Rules, this *ex parte* notice is being electronically filed for inclusion in the public record for the above-referenced docket. Please direct any questions concerning this filing to the undersigned.

Sincerely,

s/
L. Elise Dieterich
Counsel to RCN Telecom Services, Inc.

cc (by e-mail): Stacy Robinson
Simon Wilkie
Susan Eid
Susanna Zwerling
Catherine Crutcher Bohigian
Royce Sherlock
Roger Holberg
Erin Dozier
David Sappington
James Bird
Donald Stockdale
William Dever
Cynthia Bryant
Jeff Tobias
Qualex International